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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 224 Misc.

MARTIN WAGNER, PETITIONER

v.

HARVEY V. HIGLEY, ADMINISTRATOR OF VETERANS AFFAIRS, ET AL.

ON MOTION TO PROCEED IN FORMA PAUPERIS AND ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION TO THE GRANTING OF THE PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The decision of the Regional Director, Second United States Civil Service Region, and the two decisions of the Civil Service Commission's Board of Appeals and Review (Appendices B and C, respectively, *infra,* pp. 15-17), referred to in the complaint (J.A. 27),[1] are not

[1] References "J.A. —" are to the typewritten Joint Appendix; references "T. —" are to the Transcript of the Hearing of the Grievance Committee which was convened by the Veterans' Administration at petitioner's request. This Transcript was filed in the District Court by petitioner in support of his motion for summary judgment (see J.A. 39, 45) and comprised the Supplemental Record below.

officially reported. The opinion of the District Court (J.A. 52) and of the Court of Appeals (Pet. 34A-36A) are not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on May 17, 1956 (R. 59). The petition for a writ of certiorari was filed on August 15, 1956. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether petitioner's rights under the Veterans' Preference Act were violated when, upon the abolition of his position as Supervisory Claims Examiner, GS-8, petitioner was reassigned to the position of Education Benefits Specialist, GS-8, instead of being promoted to the newly created position of Supervisor, Education Benefits Specialist, GS-9.

STATUTES AND REGULATIONS INVOLVED

Section 12 of the Veterans' Preference Act (58 Stat. 390, 5 U.S.C. 861), the pertinent parts of the Civil Service Regulations (5 C.F.R. (1954 Cum. Supp.)) §§ 20.2, and 20.5, and of the Veterans' Administration Personnel Manual, are set forth in Appendix A, *infra*, pp. 12-15.

STATEMENT

The basic issue in this case is virtually the same as is presented in the petition for certiorari in *Cutting* v. *Higley, et al.*, No. 317, this Term. Both cases arise out of the same Veterans' Administration reorganization. The petitioners in *Cutting* formerly held the position of Claims Examiner; petitioner here held a position supervising nine Claims Examiners. Because of a realignment of functions, induced by new legislation, all

of the Claims Examiner and all of the Supervisory Claims Examiner positions throughout the country were abolished, and pursuant to reduction-in-force regulations petitioners in both cases were reassigned to other jobs. Petitioner here, who formerly occupied a grade GS-8 position, was reassigned to a different position at grade GS-8. In both cases petitioners contend that their rights under Section 12 of the Veterans' Preference Act were violated when the VA failed to select them, but instead selected other employees with lower retention credits, for certain newly created positions carrying different and more responsible duties and higher salary grades.

Although the present case comes to this Court on a different record, substantially all of the facts with reference to the reorganization, insofar as the Claims Examiner position is concerned, which are set forth in the Statement of our Brief in Opposition in *Cutting*, appear in the record in the present case (see, *e.g.*, T. 24-28, 175-178), and we respectfully refer the Court to our Statement there for details. Here we shall relate only the pertinent facts concerning the supervisory position.

Petitioner, a veteran, held the position of Supervisory Claims Examiner, at grade GS-8 (T. 18, J.A. 26).[2] Because of the elimination of the Claims Examiner position, the Supervisory Claims Examiner position was similarly abolished and the new position of

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[2] Although holding a GS-8 position, petitioner received a GS-10 salary. The position had previously been classified GS-10. In 1952 it was reclassified GS-8. Under the salary saving provisions of the applicable regulations (5 C.F.R. § 25.103(e)), petitioner, who had held the job while it was GS-10, continued to receive a GS-10 salary (J.A. 26, T. 31, 177).

Supervisor, Education Benefits Specialist, at grade GS-9, was established to superintend and guide the work of the new Education Benefits Specialists (T. 175-178). Just as the work of the new Education Benefits Specialist differed substantially from that of the former Claims Examiner, in that the Specialist was required to do field work and to investigate the books and records of schools in connection with compliance surveys, so the work of the new Supervisor, Education Benefits Specialist, GS-9, differed from that of the former Supervisory Claims Examiner, GS-8. As petitioner himself admitted when he testified at his grievance hearing, the new compliance functions of the Education Benefits Specialists altered the duties of the supervisor in that, "It takes on a more significant phase and broadens the responsibility of the supervisor" (T. 27); it changes the supervisor's functions "With respect to [the supervisor's] guiding and aiding the educational benefits representatives in the preparatory stages for the visits to schools and facilities; with respect to evaluating his reports upon completion of such visits; with respect to aiding him in making proper recommendations; showing him and telling him what to look for and telling him how to evaluate * * *" (T. 27-28).[3] An extensive training program was set up for the new position of Education Benefits Specialist to instruct employees as to the functions of the new position, and petitioner, who was later detailed to this new position, participated in this training program (T. 26).

The reorganization, as it affected the New York Re-

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[3] But petitioner also asserted that this was "not new to the supervisor" because a Supervisory Claims Examiner, he said, maintained school files, was in contact with training facilities, and made recommendations for action and investigation (T. 28).

gional Office, contemplated the creation of 3 units, each to consist of 9 Education Benefits Specialists headed by a Supervisor (T. 178). As related in our Brief in Opposition in *Cutting,* a panel was convened in February to evaluate the employees to determine those best qualified for the new Education Benefits Specialist position (T. 178).[4] Later that month another panel, comprised of certain of petitioner's immediate superiors, was convened to evaluate personnel who might be best qualified for promotion to the new Supervisor positions (T. 34). One member of the panel had less retention credits than petitioner and had potential rights to the new position if he (the member) should be demoted (T. 201).

After considering the qualifications of all of the employees in the Section, the panel narrowed their list to the four persons then holding supervisory positions (T. 63, 164). Petitioner had higher retention credits than the other three employees (T. 9).[5] Following a discussion concerning the demonstrated work performance, abilities and characteristics of the four men, the panel, by individual secret ballot, gave each man a rating for each of the evaluating factors considered (T. 37-39). On the basis of this evaluation, petitioner was deemed qualified, but the other three were judged better qualified than he for the new position (J.A. 41; T. 154-155). The panel's ratings were then transmitted to the Chief of the Division and the Manager of the Regional Office (T. 35, 154).

Thereafter, on February 24, 1953, petitioner was tem-

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[4] Petitioner here, as one of the 4 Supervisory Claims Examiners, was a member of that panel which evaluated the qualifications and merits of petitioners in *Cutting* (T. 178).

[5] The others also had preferences, being disabled veterans (J.A. 46A, 46B, 46C).

porarily detailed for a period of 60 days to the proposed position of Educational Benefits Specialist, and the other three employees were detailed to the proposed position of Supervisor, Educational Benefits Specialist (T. 4, 181, 185). In April, petitioner's detail was renewed (T. 184-185). On May 1, 1953, the Civil Service Commission formally established the new position of Supervisor, Educational Benefits Specialist, at grade GS-9 (T. 5). Following this action by the Commission (J.A. 42), on May 10, 1953, the three other employees were promoted from their old GS-8 positions to Supervisor, Educational Benefits Specialist, positions at grade GS-9 (J.A. 46A, 46B, 46C). On May 11, 1953, petitioner was given a 30 day reduction in force notice, to be effective on June 11, 1953 (J.A. 42). Simultaneously, he was offered reassignment to the position of Educational Benefits Specialist, GS-8 (J.A. 28). Petitioner accepted the reassignment but without prejudice to his right to protest the action (J.A. 28). On June 11, 1953, petitioner was reassigned from his Supervisory Claims Examiner position at grade GS-8 to the position of Educational Benefits Specialist at the same grade (J.A. 46D).[6] He is now employed in that position (J.A. 28).

Meanwhile, following his initial detail to the position of Education Benefits Specialist in February 1953, petitioner invoked the agency's grievance procedure to protest its action (J.A. 44-45). His contentions there

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[6] Upon being reassigned from his abolished grade GS-8 position to a different grade GS-8 position, petitioner was no longer eligible to continue receiving a grade GS-10 salary (see fn. 2, *supra*, p. 3). The regulation permitting the greater compensation was applicable only so long as the employee remained in the *same* position (5 C.F.R. § 25.103(e). Consequently, petitioner's compensation was reduced from GS-10 to the top of grade GS-8, a loss of $755 per year (T. 31, J.A. 46D).

—that his veterans' preference rights were violated when he was not chosen for the new and higher graded supervisor position, and that the promotion procedures followed were improper—were basically the same as he advances in his petition here (see *e.g.*, T. 192 *et seq.*). After hearings were held (T. 1 *et seq.*), the Acting Manager of the New York Regional Office, by a decision dated July 7, 1953, sustained the action of the agency (J.A. 45). On petitioner's appeal, the Administrator of Veterans' Affairs affirmed that determination on September 4, 1953 (*ibid.*).

Petitioner also appealed to the Civil Service Commission. By a decision dated June 30, 1953, the Commission's Second Regional Office similarly affirmed the agency's action (*id.*). After further appeal, the latter determination was affirmed by two decisions, dated September 18 and October 20, 1953, of the Commission's Board of Appeals and Review (J.A. 45; *infra*, pp. 15-17). Petitioner then instituted this suit. His amended complaint seeks a judgment declaring the agency's action invalid, and a mandatory injunction that he be appointed to the position of Supervisor, Education Benefits Specialist (J.A. 24, 34-35). No answer was filed. On cross-motions for summary judgment (J.A. 36, 46), the District Court, rejecting the report of the Commissioner of Veterans Cases (J.A. 47), granted respondents' motion and denied petitioner's (J.A. 52). The Court of Appeals, adhering to its decision in the *Cutting* case (C.A. D.C., No. 12898, decided May 17, 1956), affirmed (Pet. 34A-36A).

ARGUMENT

Petitioner, who held a grade GS-8 position, was reassigned to a different position at grade GS-8, when his

former position, and all like ones in the country, were abolished. Petitioner argues that this reassignment violated his veterans' preference rights because three other employees, who held the same position as he formerly held and who had less retention credits than he, were chosen for a newly created position at grade GS-9 before he was given a reduction in force notice and offer of reassignment. The issue raised is essentially the same as is involved in *Cutting* v. *Higley, et al.*, No. 317, this Term, and for the reasons stated in our Brief in Opposition in that case, to which we respectfully refer the Court, it is evident that the decisions below were correct and that certiorari is not warranted.

1. As in *Cutting*, petitioner's rights of preference can be asserted only against "competing employees" (5 U.S.C. 861, *infra*, p. 12; *Elder* v. *Brannan*, 341 U.S. 277, 283). Since no competing employee was retained as a Supervisory Claims Examiner, GS-8, petitioner's claim depends entirely upon his contention that the newly created position of Supervisor, Education Benefits Specialist, GS-9, to which the other employees were promoted, was practically the same as the abolished position and therefore on the same competitive level (see 5 C.F.R. § 20.2 (f), *infra*, p. 13).

But that contention presents essentially a question of fact and, as the court below observed (Pet. 35A), petitioner's argument that the two positions were in fact interchangeable was rejected by the Veterans' Administration, by the Civil Service Commission, and by the District Court. The Court of Appeals could find no basis in the record for disturbing that determination.

Accordingly, the two-court rule is applicable.[7] Moreover, as we show in our *Cutting* brief, the ruling below follows settled principles, involves no conflict, and presents no question of general importance.[8]

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[7] Petitioner's repeated assertion that the new position was but an "upgrading" of the old one, and that the matter of the differences between the two positions was never before the administrative agencies (Pet. 25-28) is without merit. The Transcript of the Grievance Hearing demonstrates unequivocably that the issue was raised, was disputed and was considered. Thus, petitioner himself testified on the issue (T. 27-28); the agency representative discussed and introduced letters from headquarters explaining the reorganization and new functions (T. 176-182) to meet the issue which, in the words of the Chairman of the Grievance Committee, was "whether or not these were new positions" (T. 180); petitioner's counsel discussed the issue on summation, arguing that, "We were not dealing with the promotion. We were not dealing with a new job" (T. 196-197); and the decisions of the Civil Service Commission make specific reference to the point. Thus, the two decisions of the Commission's Board of Appeals and Review, affirming the agency action, note that one of the two grounds of petitioner's appeal is the claim that he was in the same competitive level as the other three employees (*infra*, pp. 15, 17), and the Board's second decision states that, "We must give weight to the fact that there were new duties important enough to warrant an increase in classification grade. *The addition of these duties in the new positions was sufficient to place them in a competitive level different from that of the prior lower grade positions*" (*infra*, p. 17; emphasis added).

Similarly without merit is petitioner's assertion that at the agency hearing "the interchangeability of positions was virtually acknowledged" (Pet. 27). The colloquy quoted by petitioner in substantiation relates only to the fact that petitioner was *qualified* for the new job. But being qualified for a different and higher rated position obviously is not, of itself, controlling. Neither the Veterans' Preference Act nor the Regulations compel the agency to promote qualified employees when their position is abolished. See 5 C.F.R. § 20.5(d), *infra*, p. 14.

[8] *Laden* v. *Crosson*, 108 F. Supp. 240 (E.D. Pa.), heavily relied on by petitioner, is plainly distinguishable because there, unlike the present case, the agency had not abolished all positions like the one plaintiff formerly held; the non-veteran employees who were retained in that position in preference to plaintiff were obviously within his competitive group, and no promotion or change in func-

2. Petitioner's additional argument (based on provisions in VA's Personnel Manual, *infra*, pp. 14-15), that his rights to promotion were prejudiced because one of his superiors, who sat on the panel which evaluated the candidates for promotion, had less retention credits than petitioner and had a potential right to the new position if the superior were demoted, is effectively disposed of by the opinion below (Pet. 36A). Clearly, such a theoretical interest in the position is too remote and indirect to disqualify the superior automatically from the panel, particularly in the absence of any showing of bias. To hold otherwise would frequently result in disqualifying the very persons who are most competent to judge which of the candidates are best qualified for promotion, *i.e.*, the candidates' own superiors who have more intimate knowledge of the candidates' demonstrated abilities and past performance than anyone else.

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tions of the position in question was involved.

Section 14 of the Veterans Preference Act (58 Stat. 390, as amended, 61 Stat. 723, 5 U.S.C. 863), also relied on by petitioner, is not apposite since it bars discharge or reduction in rank or compensation except "for such cause as will promote the efficiency of the service"; the present case, on analysis, is really a claim to a promotion, and that section affords no privileges in connection with an agency's promotion action. Although petitioner sustained a loss in salary when he was reassigned from one GS-8 position to another GS-8 position, the loss did not stem from a demotion but from the fortuitous fact that he was formerly receiving a GS-10 salary while occupying a GS-8 position. See fns. 2 and 6, *supra*, pp. 3, 6.

CONCLUSION

For the reasons stated above, and for the reasons stated in our Brief in Opposition in *Cutting, supra,* it is respectfully submitted that the petition for a writ of certiorari should be denied.

J. LEE RANKIN,
Solicitor General.
GEORGE COCHRAN DOUB,
Assistant Attorney General.
MELVIN RICHTER,
LESTER S. JAYSON,
Attorneys.

SEPTEMBER, 1956.

APPENDIX A

Statutes and Regulations Involved

1. Section 12 of the Veterans' Preference Act, 58 Stat. 390, 5 U.S.C. 861, provides:

> In any reduction in personnel in any civilian service of any Federal agency, competing employees shall be released in accordance with Civil Service Commission regulations which shall give due effect to tenure of employment, military preference, length of service, and efficiency ratings: *Provided,* That the length of time spent in active service in the armed forces of the United States of each such employee shall be credited in computing length of total service: *Provided further,* That preference employees whose efficiency ratings are "good" or better shall be retained in preference to all other competing employees and that preference employees whose efficiency ratings are below "good" shall be retained in preference to competing nonpreference employees who have equal or lower efficiency ratings: *And provided further,* That when any or all of the functions of any agency are transferred to, or when any agency is replaced by, some other agency, or agencies, all preference employees in the function or functions transferred or in the agency which is replaced by some other agency shall first be transferred to the replacing agency, or agencies, for employment in positions for which they are qualified, before such agency, or agencies, shall appoint additional employees from any other source for such positions.

2. Civil Service Regulations in effect at pertinent times herein provide in material part (5 C.F.R. [1954 Cum. Supp.] §§ 20.2, 20.5):

§ 20.2 *Definitions.* For the purposes of the regulations in this part definitions are given for words, terms and phrases as follows:

* * * * *

(c) "Competing employees" for any position in a reduction in force means the position incumbent, if any, and employees who are qualified for the position.

* * * * *

(f) "Competitive level" means all similar positions within a competitive area in which employees could be readily interchanged, without undue interruption to the work program. (Generally such positions will be in the same grade or occupational level, but this is not necessary if the other tests are met.)

* * * * *

(h) "Retention credits" are credits given for length of government service and performance ratings.

* * * * *

§ 20.5 (b) *Employees in positions in the competitive service.* (1) No employee may be separated, or furloughed for more than thirty days, or reduced in pay or grade in a reduction in force while a competing employee with lower retention standing is retained in the same competitive level.

(2) No employee in any subgroup of the career group or the career-conditional group who is willing to accept a reasonable change in position may be separated, furloughed for more than thirty

days, or subjected to greater reduction in pay than necessary under such reasonable change in position, if he is qualified for a continuing position in another competitive level in his present competitive area in which an employee with lower subgroup standing is retained, or if he is qualified to go back to a continuing position from which he was promoted (or to an essentially identical position) in his present competitive area in which an employee with lower retention standing is retained.

* * * * *

(d) *Reasonable change in position.* Any change in position under these regulations is reasonable if it is made without reduction in grade or pay. If a reduction in grade or pay cannot be avoided, any such change is reasonable if made with the least reduction required to conform with these regulations. Employees are not required to be given options as to alternative changes possible in any particular case. No agency shall be required to fill a vacant position, or to promote any employee, or to transfer any employee to a different duty station, and no agency shall be prohibited from taking such administrative actions. No employee rendering satisfactory service in a position shall be required to be displaced by a competing employee who is not qualified for such position under the regulations in this part.

* * * * *

3. The Veterans' Administration Personnel Manual, M5-2, provides in pertinent part (Part I, Ch. 7, Par. .06b(6)):

Screening Panels. For certain higher-grade jobs, or key positions, and where it is considered

desirable by the operating official for whom the screening is being done, a panel may be designated to conduct the screening analysis. The panel may consist of a representative of the personnel office and two persons thoroughly competent in the subject matter of the position in question. None of the panel members should be a candidate for the vacancy or otherwise have a direct personal interest in the vacancy for which screening is being conducted.

APPENDIX B

Letter Decision of the Board of Appeals and Review, Civil Service Commission

UNITED STATES CIVIL SERVICE COMMISSION
Washington 25, D. C.

September 18, 1953.

Mr. Murray A. Gordon
401 Broadway
New York 13, New York

DEAR MR. GORDON:

Your appeal, in behalf of Mr. Martin Wagner, from the decision of the Commission's Second Civil Service Region, concerning a reduction in force at the Veterans Administration Regional Office, New York, New York, has been carefully considered by this Board.

You based your appeal on two grounds, namely, (1) that Mr. Wagner was in a competitive level with three other employees with lower retention standing who were retained, and (2) that improper procedures were used in selecting the other three employees for promotion to a higher grade in anticipation of the reduction in force. The record shows clearly that the promotion of

the other three employees was made before the effective date of the reduction in force in Mr. Wagner's case, which placed them in a separate competitive level. We do not find any error in selecting any of the other three employees for promotion. We are unable, therefore, to sustain either of the two grounds of your appeal.

Since there was no error in the decision of the Commission's Second Region, it is affirmed and your appeal is denied.

Sincerely yours,

JOHN E. BLANN,
Chairman Board of Appeals and Review.

APPENDIX C

Letter Decision of the Board of Appeals and Review, Civil Service Commission

UNITED STATES CIVIL SERVICE COMMISSION
Washington 25, D. C.

October 20, 1953.

Mr. Murray A. Gordon
401 Broadway
New York 13, New York

DEAR MR. GORDON:

We have your letter of September 29, 1953, commenting on our decision of September 18, 1953, on your appeal in behalf of Mr. Martin Wagner.

You challenge the correctness of our statement "that the promotion of the other three employees was made before the effective date of the reduction in force in Mr. Wagner's case," because some changes in work assignments had been made on a tentative basis prior to the official promotion of the other three employees.

However, you confirmed the correctness of this statement by reporting May 11, 1953, as the effective date of the promotions, and June 11, 1953, as the date when Mr. Wagner was officially placed in the different position.

We also note your contention that Mr. Wagner and the three promoted employees were in the same competitive level on June 11, 1953, the effective date of the reduction in force, although you report that a distinction in work was initiated on February 24, 1953. We must give weight to the fact that there were new duties important enough to warrant an increase in classification grade. The addition of these duties in the new positions was sufficient to place them in a competitive level different from that of the prior lower grade positions.

The Commission has no authority under which it could deprive the agency of administrative discretion in selecting employees for promotion when there are more qualified candidates than there are positions to which promotions could be made. Without such authority, we cannot sustain your appeal in behalf of Mr. Wagner. We must therefore reaffirm the prior decicision in his case.

Sincerely yours,

JOHN E. BLANN,
Chairman Board of Appeals and Review.

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